In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 558

THE ATLANTIC REFINING COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–15a) is reported at 344 F. 2d 599. The decision and order of the Federal Trade Commission (App., *infra*, pp. 9–31) are not yet reported.[1]

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1965. A petition for rehearing was denied on June 14, 1965. The petition for a writ of certiorari was filed on September 10, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Petitioner has not included the Federal Trade Commission's decision and order in his petition for certiorari. For the convenience of the Court and the parties, the Commission's opinion is printed in the appendix to this brief.

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QUESTIONS PRESENTED

The court below affirmed the Federal Trade Commission's ruling that the Atlantic Refining Company unlawfully fixed the resale price of its gasoline by means of consignment agreements which it employed only during the course of "price wars" involving its retail dealers. The questions presented are:

1. Whether Atlantic's use of "consignment" for resale price maintenance is unlawful.

2. Whether the issuance of a cease and desist order here raises the question whether the *Simpson* decision was intended to be applied retroactively.

3. Whether the Commission's order is invalid because only three of the five members of the Commission participated in the decision and one of them dissented.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, provides in pertinent part:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

STATEMENT OF FACTS

Petitioner (Atlantic) is a large refiner of gasoline and petroleum products, which it markets throughout a 17-State area. It sells its products to service stations and also to wholesalers who resell to service stations. The company has divided its sales territory into numerous pricing areas, and its policy is that there shall be one uniform retail price in each pricing area (R. 930a[1]). Under stable market conditions, this is

[1] "R." is the printed joint appendix below.

accomplished by the company's suggesting retail prices or requiring adherence to State fair trade laws (R. 822a, 587a). In 1956, Atlantic adopted a consignment plan designed to achieve the same price uniformity in marketing areas experiencing "price wars". Under this plan, when Atlantic sold directly to a service station, it retained title to the gasoline until resold to the consumer and set the retail price at which each "consignee" was required to sell (App., *infra,* pp. 15–16). In return, the consignee received a "commission" of slightly more than 4¢ per gallon of gasoline sold. Each dealer buying directly from Atlantic in the affected pricing area was given the choice of accepting consignment or continuing to buy gasoline from Atlantic at the normal wholesale price—which was substantially greater than the amount (the retail price less the commission) paid by consignees to Atlantic (App., *infra,* pp. 12–13). To control the prices of the non-direct-buying service stations, Atlantic offered its wholesalers a discount on gasoline provided they resold to retailers at a price fixed by Atlantic and the retailers resold to the public also at a price fixed by Atlantic (App., *infra,* p. 12).

A series of price wars erupted on the Delmarva Peninsula (comprising portions of the States of Delaware, Maryland, and Virginia) in 1957–1958, and Atlantic placed its consignment and wholesale discount plans into effect. The Federal Trade Commission in 1958 issued a complaint charging that in so doing Atlantic had violated Section 5 of the Federal Trade Commission Act by fixing retail gasoline prices. After full evidentiary hearings, the Commission entered a cease

and desist order. The court of appeals affirmed (Pet. 15a).

In its decision, which preceded this Court's decision in *Simpson* v. *Union Oil Co.*, 377 U.S. 13, the Commission found, first, that Atlantic's efforts to control the retail prices of dealers who bought from independent wholesalers constituted an unlawful conspiracy to fix prices (App., *infra*, pp. 23–25). The Commission also found that the consignment plan was, in reality, an illegal price-fixing device. It found that dealer acceptance of "consignment" was coerced since, for the affected dealers, the only alternative to consignment was economic death (App., *infra*, p. 13). Atlantic's argument that its consignment agreement was a *bona fide* marketing plan lawful under this Court's holding in *United States* v. *General Electric Co.*, 272 U.S. 476, was rejected on several grounds. In the *General Electric* case, the Commission noted, the agency agreement was used to market a patented product. Also, General Electric's consignment system was its regular method of marketing, whereas Atlantic used consignment only in areas experiencing price wars. Most important, Atlantic's consignment plan, far from being a *bona fide* marketing method, was adopted specifically to enable Atlantic to fix and control retail prices of its dealers during price wars (App., *infra*, pp. 20–22). Moreover, the Commission found that the consignment plan was unlawful as part of an overall attempt to control the retail prices of all Atlantic dealers, whether they acquired gasoline through distributors or directly from Atlantic (App., *infra*, pp. 24–25).

The Commission's order was appealed to the Court of Appeals for the Sixth Circuit. While the appeal was pending, this Court decided in the *Simpson* case that consignment agreements permitting a major gasoline producer to fix the retail prices charged by a large number of dealers violated the antitrust laws. The question of the applicability of *Simpson* to the present case was fully briefed to the court of appeals, which disposed of the major issues in this case on the basis of the *Simpson* decision (Pet. 1a). It also held that all of the Commission's findings were supported by substantial evidence (Pet. 14a), including the findings that the dealers were coerced into accepting consignment and complying with its terms (Pet. 13a–14a) and that consignment was part of an overall illegal plan to fix and maintain prices (Pet. 9a).

ARGUMENT

1. The court below correctly held that *Simpson* "seems definitive as to the principal argument at issue pertaining to whether consignment agreements may be used by a producer to fix and maintain retail prices" (Pet. 10a), noting that "[t]his case deals with the same industry and a parallel employment of a consignment agreement" (Pet. 12a). Petitioner's claim that the case is different because Union Oil applied coercion in securing the execution of its consignment agreements is without merit, in view of the finding by the Commission, upheld by the court of appeals, that Atlantic did in fact employ coercion. The court agreed with the Commission that Atlantic, by refusing to lower its price to the dealers during the "price war", in which retail gasoline prices were severely de-

pressed, had offered its dealers "only the choice of economic disaster or the consignment agreement"—a "Hobson's Choice", not a free choice (Pet. 14a).

Nor is there any merit to Atlantic's claim that this case is distinguishable from *Simpson* because the consignment plan here was utilized only in price wars. This fact, as the court below noted, "simply underlines the fact that this was indeed, as found by the Commission, a price-fixing mechanism" (*ibid.*), not a *bona fide* distribution method. Atlantic's further claim that it conceived of the consignment device as a nondiscriminatory method of enabling its dealers to remain competitive during price wars is refuted by the fact that it forced its consignee-dealers, against their wishes, to raise their retail prices (R. 853a). Finally, in *Simpson,* this Court expressly rejected the argument that a consignment plan should be permitted on the ground that it serves to protect dealers' profit margins during retail price disturbances, stating that it is "a justification similar to that traditionally advanced for resale price maintenance" (377 U.S. at 19–20, n. 6).[3]

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[3] There is no merit to Atlantic's suggestion (Pet. 17–19) that there is a conflict between the decision below and the decision of the Seventh Circuit in *Sun Oil Co.* v. *Federal Trade Commission* (350 F. 2d 624, Pet. 19a–42a) on the question whether presenting a dealer with a Hobson's choice between economic disaster or acceptance of consignment amounts to coercion. The Seventh Circuit declined to make a finding on the question whether Sun had employed coercion only because the Commission itself had made no such finding (Pet. 38a–39a). In the present case, the Commission made such a finding, and the court of appeals upheld it. The Seventh Circuit in *Sun* affirmed the Commission's ceases and desist order, as did the court below.

2. The court of appeals correctly held that the question of the retroactive application of *Simpson* is not presented by this case (Pet. 15a). The Federal Trade Commission's cease and desist order operates only prospectively; it does not involve any award of damages for past misconduct—the only situation in which this Court suggested that a question of the fairness of retroactive application might arise. Moreover, respondent's conduct was, as the Commission found, illegal under the law as it stood prior to *Simpson*. The Commission held that "respondent utilized the consignment system of marketing as a device to control prices admittedly to avoid the impact of the Clayton and Sherman Acts" (Pet. 9a); that it "very clearly desired to stifle price competition" among its dealers (Pet. 8a–9a); that the device was employed "as an integral unit of a horizontal and vertical price fixing scheme" (Pet. 9a); and that such conduct was not protected under the *General Electric* ruling.

3. Atlantic contends that because only three Commissioners participated in the decision, and one dissented, the Commission's order is invalid (Pet. 21–23). As the court below noted, however, the rules of the Federal Trade Commission have from the beginning provided for decision by the majority of panels of three members (16 CFR (1965 Cum. Supp.) 1.7). The Commission plainly had the power to enact such a rule for the conduct of its business. 15 U.S.C. 46(g); *Drath* v. *Federal Trade Commission*, 239 F. 2d 452 (C.A. D.C.), certiorari denied, 353 U.S. 917. See, also, *Frischer & Co.* v. *Bakelite Corp.*, 39 F. 2d 247

(C.C.P.A.), certiorari denied, 282 U.S. 852; *WIBC, Inc. v. Federal Communications Commission*, 259 F. 2d 941 (C.A. D.C.), certiorari denied, 358 U.S. 920.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1965.

APPENDIX

United States of America

Before Federal Trade Commission

COMMISSIONERS:

Paul Rand Dixon, *Chairman*
Sigurd Anderson
Philip Elman
Everette MacIntyre
A. Leon Higginbotham, Jr.

Docket No. 7471

IN THE MATTER OF THE ATLANTIC REFINING COMPANY, INC.,* A CORPORATION

Opinion of the Commission

By MACINTYRE, Commissioner:

This matter is before the Commission upon the cross appeals of respondent and counsel supporting the complaint from the hearing examiner's initial decision in part sustaining and in part dismissing the charges of the complaint.

The complaint alleges that respondent, a major petroleum products marketing company, individually and in combination with others, engaged in practices which had the purpose and effect of unlawfully fixing and maintaining the resale prices of gasoline in violation of Section 5 of the Federal Trade Commission

* Respondent's correct name is The Atlantic Refining Company.

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Act. Although the complaint deals with essentially a single basic factual situation, it is divided into three counts. In Count I it is alleged that the respondent individually violated the Act by coercing and forcing its lessee-dealers through means of a system known as a "temporary consignment contract", to sell at uniform and non-competitive prices. Count II of the complaint incorporates all of the allegations of Count I by reference. This Count, however, charges a conspiracy between respondent and its unnamed lessee-dealers to fix and maintain uniform and non-competitive prices. The medium through which the alleged conspiracy was allegedly effected is the aforesaid "temporary consignment contracts" between respondent and the co-conspirator lessee-dealers. Count III incorporates all of the allegations of Counts I and II, and in addition charges a conspiracy between the respondent and its unnamed independent wholesale distributors of gasoline. The alleged vehicle of this conspiracy differs somewhat from that charge as existing between respondent and its lessee-dealers. Count III charges that uniform consumer resale prices were fixed and maintained by granting the co-conspiring distributors certain allowances or rebates which they were to pass on to their dealer customers who would agree to adhere to the prices fixed by respondent in its illicit practices involving its lessee-dealers.

The hearing examiner found that only Count III of the complaint had been sustained, and issued an order which directed the respondent to cease and desist from fixing or maintaining the "wholesale price" at which its products are sold by "wholesale distributors" or the retail price at which its products are to be resold by retail service stations owned or served by wholesale distributors. Complaint counsel are appealing the dismissal of Counts I and II of the com-

plaint, and respondent is appealing the finding and order with respect to the allegedly illegal practices charged in Count III.

* * * * *

The respondent is a Pennsylvania corporation, primarily engaged in the production, sale and distribution of gasoline and other petroleum products throughout a 17-state marketing area. Its "regular" gasoline is sold under the brand name "Atlantic", and its high test fuel under the name "Imperial". Respondent owns and operates refineries at Philadelphia, Pennsylvania, and Atreco, Texas. In 1956 its gross domestic sales of petroleum and chemical products, including sales of its consolidated subsidiaries, amounted to approximately $379,000,000.

The respondent markets its gasoline in two ways. It sells directly to the operators of retail gasoline service stations who either own and operate their own stations, or lease the premises from the respondent or others. The second marketing system entails sales to wholesale distributors who in turn resell to retail service station dealers. In the geographic area with which the facts of this case are concerned, respondent used both systems.

The controversy in this case centers chiefly in an area referred to by the examiner as the Delmarva Peninsula". As a glance at the map will show, the Delmarva Peninsula is that body of land which separates the Chesapeake Bay from the Delaware Bay and Atlantic Ocean. It acquires its name from the fact that it lies within the boundaries of the States of Delaware, Maryland and Virginia. In 1957 a gasoline price war erupted on the Peninsula. The allegedly unlawful acts and practices of this respondent were performed in connection with this price war.

The practices engaged in by the respondent in the Delmarva price war were not spur of the moment expedients but constituted the implementation of predetermined company policy. The respondent states "under price war conditions it is the policy and practice of respondent to assist its retail dealers to remain in business. It is likewise the policy and practice of respondent to assist its distributors in order that they may, in turn, sell to their retail dealers at a price which allows such retail dealers to be generally competitive and thus not suffer economically and competitively or be forced out of business."

* * * * *

Since, as aforesaid, the respondent utilized two methods of distribution, their "assistance" to dealers in a price-war area, was accomplished in different fashions. As alleged in Counts I and II of the complaint, on direct sales to retail service stations, the respondent utilized temporary consignment contracts. This procedure was devised and implemented by the company in early 1956. It provided: "When price war conditions prevail in a given competitive trade area so that the spread between the dealer [tank wagon] price of Atlantic gasoline and the prevailing service station price at comparable service stations is less than 4¢ per gallon, all Atlantic dealers * * *" will be offered the opportunity to "execute a contract sales agreement and become our contractors for the retail sale of Atlantic-owned gasoline".

It is important to note that the company's program as planned and implemented, did not entail forcing dealers, including lessee-dealers, operating on company-owned premises, to execute the consignment agreements but under the circumstances, such overt control was unnecessary. Any dealer faced with a

price-war situation was offered the consignment program or nothing. In other words, the company would not reduce its prices to him to enable him to independently set his own resale price and thereby meet competition as he saw fit. He was offered, in effect, "Hobson's Choice" of continuing to buy at the normal dealer price, entering a consignment agreement, or terminating all existing contractual relations with the respondent. As several of the dealer-witnesses testified, it was a case of either signing the consignment contract or going out of business. Respondent argues that the only coercive force present in the situation was engendered by the price war market conditions, which the record shows it did not create. But this is no answer. One cannot justify offering a hot poker to a drowning man by averring that the water was to blame. To the extent that the lessee-dealers had no alternative but economic death to entering a consignment-agreement with respondent, it must be found that they were pressured or coerced to enter such contracts and the hearing examiner's finding to the contrary is in error. However, there does not appear to be any evidence in this record that the respondent used its position of economic power over its lessee dealers to force them into entering the contract. Under the business conditions which existed, such pressure was unnecessary.

The basic charge made in Counts I and II of the complaint is that the consignment program as practiced by the respondent, resulted in illegal price fixing. The factual complex in which the allegedly illegal scheme was utilized is described by the hearing examiner at pages 13 and 14 of the initial decision. In summary, he found that from time to time during early 1957, the respondent surveyed the consumer prices charged by various gasoline companies' out-

lets in the Delmarva Peninsula. The survey disclosed that in respondent's areas 1 and 2, both in Newcastle County, Delaware, the major marketing companies' outlets were selling regular gasoline at prices ranging from 25.9 to 27.9 cents per gallon. In Kent County, Delaware (respondent's area 3), prices ranged from 25.9 to 28.9 cents. In Sussex County, Delaware (respondent's area 4), there were only two prevalent prices, 26.9 cents and 27.9 cents.

By June 1957 the respondent had already placed its consignment program into effect in its areas 1, 2 and 3 but had taken no action in this respect with respect to the Sussex County area.

In June 1957, Atlantic made another survey of the Delmarva Peninsula area and found that the majority of the major brand competitors in the areas 1, 2 and 3 were posting retail prices at 26.9 cents per gallon on regular gasoline. Effective June 26, 1957, respondent reduced the consumer price at its contract sales consignment stations in these areas from 27.9 to 26.9 cents per gallon.

By July 1, 1957, it appeared that most of the gasoline stations in the Sussex County areas were then posting a price of 26.9 cents per gallon for regular gasoline. The examiner found that the stations selling at this price included "11 Esso stations, 2 Gulf stations, 2 Mobil (Socony) stations, 5 Sunoco stations, 7 Amoco stations, 4 Cities Service stations, 8 Pure Oil stations, 3 Shell stations, 4 Sinclair stations, and 5 Texaco stations. Some of the retail dealers received rebates off their tank wagon price. It was reported that the Sun Oil Company was operating on a commission agreement plant similar to respondents."

At this time the Sussex County lessee-dealers were paying respondent 24.3 per cent per gallon for regular

gasoline. The examiner found that at this cost price, "Atlantic dealers and lessee-dealers could not compete with such low retail prices of their major competitors. They appealed to the respondent for relief." In response to this appeal, the respondent's representatives contacted the dealers and offered them the consignment agreement which respondent refers to as its "contract sales agreement."

There is no dispute concerning the basic details of the consignment program. The hearing examiner succinctly explains it at page 16 of his initial decision, in the following terms:

> "1. The Company will place gasoline on consignment with the dealer subject to prior approval by the Credit Department. At the time of each replenishment delivery, the volume of gasoline on consignment is to be brought to its original level. The dealer will settle in cash at the time of replenishment for the number of gallons equal to the replenishment delivery on the basis of Atlantic's posted service station price at the time at which the gasoline was sold, less a commission for Atlantic gasoline, representing 23% of the service station price for the product, excluding all taxes.
>
> "2. Atlantic will specify the service station price of gasoline posted by the dealer during the period of the consignment plan agreement, the dealer to be trustee of proceeds of sale.
>
> "3. Title to gasoline constituting any replenishment delivery shall not pass to the dealer."

The record reveals that respondent entered consignment agreements with 37 of its dealers in its area number 4 during 1957 and 1958. Two of these dealers were located in Maryland and the remainder in Delaware. Although the price war was over in Sussex County, Delaware, by September 13, 1957, dealers in that County remained under the consignment pro-

gram until as late as September 1958. The price war continued for a longer time in Newcastle and Kent Counties in Delaware, and thereto the consignment-agreements remained in effect during 1958.

There can be no doubt but that respondent, through the operation of this consignment program as above described was able to, and did, in fact, fix uniform retail prices for gasoline sold to consumers by its lessee-dealer service stations in its areas 1, 2, 3 and 4, located on the Delmarva Peninsula. But in order to maintain the prices established by the respondent through the consignment program, it was necessary to secure the compliance of these dealers who did not buy directly from respondents but through an intervening wholesale distributor. Respondent's announced policy on pricing is:

> "There will be only one retail price at all times in any given pricing area. This will be called Atlantic's posted retail price.
>
> "A reasonable relationship will always be maintained between posted retail price, posted dealer tank wagon price, and posted consumer tank wagon price."

Since the dealers buying from a wholesale distributor were his customers and not those of the respondent, control over their prices could only be maintained and secured by enlisting the cooperation of the wholesale distributor who served them. The hearing examiner found that the respondent did secure the cooperation of its sometimes unwilling distributors, and thereby conspired with them to fix prices as charged in Count III of the complaint and in violation of Section 5 of the Federal Trade Commission Act.

The system pursued was to grant the wholesale distributor a lower price to enable him to in turn sell at a lower price to such dealers as would maintain the

consumer price set and fixed by respondent for its direct buying dealers operating under the consignment plan. The simple mechanics of the pricing procedure utilized are explained in an Atlantic bulletin to its district managers, as follows:

> "A fictitious dealer tank wagon price will be computed by using the retail price, excluding tax, that we have established on contract sales operation less 23%. For example, if we are on contract sales operation at 26.9, the fictitious dealer tank wagon price for use by the distributor would be 13.8. This is the price which we would expect distributors to charge their dealers within the area where we are on contract sales operations * * *".

If a wholesaler sold to a dealer at the "fictitious dealer tank wagon price" under certain conditions prescribed and enforced by the respondent, he would, upon application to respondent, be rebated two-thirds of the difference between the price he charged the dealer and what would be a normal dealer price. He was required to absorb the remaining one-third. The conditions prescribed by the respondent for a wholesaler to meet in order to secure his rebate, were:

(1) They must sell the fictitious or reduced dealer tank wagon prices to those retail dealers located in a depressed or price-war area.

(2) They must furnish respondent evidence of such sale in an application for the rebate on forms previously supplied to them by the respondent. On these forms, they must indicate the dates, gallonage sold and list the dealers to whom they gave the rebate.

(3) Upon receipt of the forms, the respondent calculated the amount of the rebate and remitted to the distributor, but only for the number of gallons sold to those dealers who had resold at respondent's fixed

retail price established for its consignment lessee-dealer stations. The distributor had to sustain the full loss for sales to those dealers for whom the respondent disallowed the rebate.

The way in which respondent's pricing plan worked with distributors is indicated by the experience of the Atlantic Oil Company of Georgetown, Delaware, one of respondent's distributors in Sussex County, Delaware. Charles B. Marsh, the witness representing this distributor, testified that the company had around 18 dealer customers. During the price wars in Sussex County in 1957, respondent assisted the Atlantic Oil Company in aiding the latter's dealers by granting refunds (in effect a lower tank wagon price) on sales. Atlantic Oil Company sold its dealers at a reduced price and in turn applied to the respondent for refunds based on the dealer assistance.

These compensatory refunds were granted by the respondent to Atlantic Oil Company on the understanding, the evidence shows, that the distributor would lower its prices to dealers and that the dealers in turn would post pump prices suggested by the respondent.

Mr. Marsh testified that J. White, an employee of respondent, checked on the pump prices of Marsh's dealers and reported this information to Marsh. This same employee also accompanied Marsh on inspection tours of Marsh's dealers. At such times White asked the dealers to raise their price to the figure recommended by respondent. Most of Marsh's dealers posted uniform pump prices during the 1957 price wars but there were four notable hold-outs. These were: Bunting, Frankfort, Delaware; Burton, Georgetown, Delaware; R. J. Campbell, Frankfort, Delaware; and McGee & West, Somerville, Delaware. When these dealers refused to sell at the pump prices

specified by respondent, Atlantic Oil Company was denied compensatory refunds on transactions with them. This is revealed by the testimony as well as documentary evidence.

Various employees of respondent, such as Mr. White and Mr. Hughes, contacted Witness Marsh about the four nonconforming dealers and insisted that they raise their prices. Mr. White recommended as possible action against these dealers, if they refused to conform to the recommended prices, that Marsh take out their pumps and insignia. Marsh was also threatened with the loss of his franchise if he did not bring these dealers into line. Mr. Zinn, District Sales Manager of respondent, requested from Marsh and received the contracts that this distributor had with such dealers. Mr. Marsh testified that the explained purpose of obtaining the contracts was to see if they could be broken. However, no such action was taken. The four recalcitrant dealers all thereafter raised their prices, although some did this only as a temporary measure and shortly returned to their prior prices.

* * * * *

As aforestated, the hearing examiner dismissed Counts I and II of the complaint, dealing with the consignment program. The dismissal is based upon his belief that the decision of the Supreme Court in *United States* v. *General Electric Co.* (272 U.S. 476, 1926), "legally gives the respondent control over the prices at which its gasoline is sold through its dealers and lessee-dealers, to the consuming public."

Before embarking on a discussion of this phase of the hearing examiner's decision, it must be clearly understood that the Commission, by discussing consignment separately, is not adopting and endorsing

the seriatim treatment afforded this matter by the hearing examiner. The Commission considers the respondent's consignment program to be an integral and inseparable part of its overall pricing policy. In restraint of trade matters, and particularly those involving conspiracies, the legality of conduct is not to be judged by dismembering the evidence and viewing it as separate and distinct entities. *United States* v. *Patten,* 226 U.S. 525, 554 (19); *American Tobacco Co., et al.* v. *United States,* 147 F. 2d, 93, 106 (6th Cir. 1944). Separate discussion is here afforded the consignment plan solely because of the unique and separate defense entered with respect to it.

The obvious point of departure in any discussion involving price fixing is *Socony-Vacuum Oil Co.* v. *United States* (310 U.S. 150, 222–223 [1940]) wherein it was held that any device which has the purpose and effect of fixing prices is an illegal restraint of trade. It is illegal, per se, without regard to whether prices were actually fixed or whether the device was completely unsuccessful in that regard. It is the act of conspiracy or combination itself which is unlawful, and no further showing need be made.

Without doubt this record shows that respondent did agree, conspire and combine with its lessee-dealers through the medium of this consignment program to fix and stabilize the consumer price of gasoline in the area under consideration. Under the *Socony-Vacuum* doctrine such a course of action is clearly unlawful unless the respondent is afforded shelter within the aegis of the *General Electric* case. It is the Commission's view that *General Electric* does not afford the respondent the needed shelter and that the hearing examiner's contrary finding that it does was in error, and must be reversed.

There is a clearcut distinction between the facts presented by the *General Electric* litigation and the instant matter. During the period prior to 1926, General Electric had managed to purchase all of the outstanding patents necessary for the manufacture of incandescent lamps. It, in turn, licensed other corporations, including competitors such as Westinghouse, to manufacture and sell lamps produced through the General Electric patent. All licensees were required to adhere to an agency-type distribution plan set up by General Electric, and were permitted to sell only at the prices set by General Electric.

In 1924 the government filed a petition against General Electric and others charging that the agency system of lamp marketing employed by them was violative of the Sherman Act. The case was tried in 1925 in the United States District Court for the Northern District of Ohio, and the Government's petition was dismissed (15 F. 2d 715). This decision was appealed to the Supreme Court, which in 1926 affirmed the District Court (272 U.S. 476). The Supreme Court decided that the agency method of distribution employed by the defendant was in fact a valid agency and not a disguised purchase-and-sale arrangement, and that General Electric as the owner of the patent, entirely controlling the use and sale of incandescent lamps, was within its rights in imposing upon its licensees conditions that their sales should be at prices fixed by General Electric.

As we see it, there is a wide difference between General Electric's permanently implemented and universally applied agency distribution of products produced under its patent and the activity of the respondent as demonstrated by this record. In this case, respondent attempted to make its dealers genuine

agents, but the change made was merely of form and not of substance. Dealers continued to operate their businesses after entering into consignment agreements in practically the same manner as before, except that they could not determine their own gasoline resale prices to consumers. They commingled money from the sale of gasoline with their receipts from the regular sale of products other than gasoline. They continued to hold themselves out as full proprietors of their stations. They received gasoline and paid out money for its value, and they then sold it at retail as before.

A dealer entering the consignment program did not receive actual payment for his gasoline inventory. The value of the gasoline was put into an escrow account. If more gasoline was needed to bring the dealer's inventory up to the pre-determined consignment level, the dealer also paid for this, and this sum was put into escrow. When the inventory was replenished, the dealer supposedly was paying for gasoline already sold, but in actual fact he was paying for gasoline delivered at the time of payment.

Unlike General Electric, the agency distribution program was not respondent's regular method of selling its products. The system is only used at irregular intervals and in certain markets during price wars. The temporary nature of the program and the shifting back and forth of customers from dealer status to so-called agency status, emphasizes that the consignment plan is a device to fix and stabilize prices, rather than a good faith marketing method.

Furthermore, decisions subsequent to the *General Electric* case have made it clear that where the antitrust acts are involved, the crucial fact is the impact of the particular practice upon competition, not the label it carries. For example, in *United States* v.

Masonite Corp., the Supreme Court held that the result must turn not on the skill with which counsel has manipulated the concept of "sale" and "agency", but on the significance of the business practices in terms of restraint of trade (316 U.S. 265, 280; 1942). Judge Yankwich, in *United States v. Richfield Oil Corp.*, 99 F. Supp. 280 (U.S.D.C. S.D. Cal. 1951), affirmed per curiam 343 U.S. 922 (1952), stated:

> "We must in each case, get behind the facade which the organization has created, —as did the Supreme Court in the *Masonite* case when it went behind a *del credere* agency, which, at first blush, seemed to be a fiduciary relationship established by the concern for its own purposes, and found, instead, a means for monpolization. The Court did not then hesitate to declare the agency a mere cloak for restraints * * *." (99 F. Supp. 289).

It is apparent from the facts that respondent very clearly desired to stifle price competition among Atlantic dealers and it sought the complete control of Atlantic retail prices in the price war area. Respondent utilized the consignment system of marketing as a device to control prices admittedly to avoid the impact of the Clayton and Sherman Acts. Doubtless the respondent felt that it had devised a consignment program valid in that it met all of the criteria of consignment as prescribed in the law of agency and it may well be that for purposes other than anti-trust law enforcement this consignment program could be upheld. But, as here employed, to effect and participate as an integral unit of a horizontal and vertical price fixing scheme, the respondent's consignment program must be held as a violation of the Federal Trade Commission Act.

Insofar as Count III of the complaint alleging a conspiracy involving respondent and its wholesale distributors is concerned, we agree with the hearing examiner's finding that this Count has been sustained. In *United States* v. *Bausch & Lomb Optical Co., et al,* 321 U.S. 707, 723 (1944) the Court said: "Whether this conspiracy and combination was achieved by agreement or by acquiescence of the wholesalers coupled with assistance in effectuating its purpose is immaterial." See also *United States* v. *Parke, Davis & Co.,* 362 U.S. 29 (1960). Here the participation of distributors in the scheme is shown. Distributor Marsh cooperated by following the procedures established by respondent for the fixing and the control of prices. Marsh also accompanied respondent's representatives on inspection tours of dealers' stations for the purpose of influencing such dealers to follow respondent's recommended resale prices. That this was effective is shown by the fact that four recalcitrant dealers changed their prices following such visits, although only temporarily in some cases. Such was aquiescence by the distributor in the illegal scheme coupled with assistance in effectuating its purpose. The hearing examiner found that distributor Marsh was an unwilling conspirator, but that fact is no defense where the party actually participates in the conspiracy. See *United States* v. *Line Material Co.,* 333 U.S. 287 (1948). There is also evidence of the participation of distributor Lister. Thus, a combination or conspiracy to maintain resale prices was organized in violation of the Federal Trade Commission Act.

The consignment agreement arrangement was an integral part of the plan to fix and maintain resale price levels in the price war areas in the "Delmarva

Peninsula". Through such agreements respondent was able to generally maintain a uniform level of prices on sales made through its dealers. This uniformity along with the actions resulting in the fixing of prices on gasoline sold to dealers buying through distributors gave to the respondent general control of price levels among dealers dispensing Atlantic gasoline in the affected areas. The consignment agreements are unlawful as a part of the whole unlawful course of conduct. They were essential to the success of the price fixing scheme just as it was necessary to the success of the venture for the dealers buying through distributors to maintain recommended prices. Where the whole course of conduct is illegal, specific practices, although in themselves lawful, may be prohibited as part of the illegal whole. Cf. *United States* v. *Bausch & Lomb Optical Co., et al.*, 321 U.S. 707 (1944). In the matter of *Snap-On-Tools Corporation*, Docket No. 7116 (Decision of the Commission, November 1, 1961). We hold in the circumstances that respondent is in violation of the law as charged in Counts I, II, and III of the complaint.

Respondent argues that its practices which the examiner found to be unlawful were not in interstate commerce. The position taken is that the commerce involved in the sale of gasoline at wholesale and at retail, with which the acts and conspiracies charged in the complaint are concerned, were purely local sales and not in interstate commerce. Section 5 prohibits unfair methods of competition in (interstate) commerce and unfair or deceptive acts or practices in (interstate) commerce. Our determination of the question turns on whether or not the course of conduct found to be unfair has been engaged in in interstate commerce.

Respondent clearly does business in interstate commerce and the gasoline involved in the resale price maintenance scheme moved in interstate commerce. Respondent shipped its gasoline from its refineries through terminal centers in Norfolk, Virginia, Newark, New Jersey, and its bulk distribution centers in Salisbury, Maryland, and Wilmington, Delaware, to storage tanks maintained by distributors, and lessee-dealers in the "Delmarva Peninsula". Respondent, with main offices in Philadelphia, Pennsylvania, and with its regional office covering the "Delmarva Peninsula" area in East Reading, Pennsylvania, entered into sales contract agreements with lessee-dealers in several states, including Delaware and Maryland.

The methods and practices used by respondent in obtaining the acquiescence and cooperation of its wholesale distributors in the price fixing scheme and their assistance in effectuating its purpose were engaged in in [sic] interstate commerce. The parties themselves, that is, respondent on the one hand and distributors on the other, were located in different states and contracts between them involved interstate commerce. Various documents used to carry out the scheme were transmitted across state lines. For instance, requests for refunds by distributors for dealer assistance were made on forms sent to Reading, Pennsylvania. Other evidence of the interstate character of the transactions relating to the price fixing scheme includes correspondence, bulletins and other matter which moved across state lines.

Thus, there was a transaction or a scheme of an interstate character, regardless of the nature of the commerce involved in the local distribution of the gasoline. Cf. *Holland Furnace Company* v. *Federal Trade Commission,* 269 F. 2d 203 (7th Cir. 1959), *cert. denied* 361 U.S. 932; *General Motors Corpora-*

tion, et al. v. *Federal Trade Commission,* 114 F. 2d 33 (2nd Cir. 1940); *Ford Motor Company* v. *Federal Trade Commission,* 120 F. 2d 175 (6th Cir. 1941) *cert. denied* 314 U.S. 668; *United States* v. *Food and Grocery Bureau of Southern California,* 43 F. Supp. 966 972 (U.S.D.C. S.D. Cal. 1942). We hold, therefore, that the methods of competition, acts and practices herein found to be unfair were engaged in in "commerce" within the meaning of that term as used in the Federal Trade Commission Act.

The Commission is fully aware of the difficulties faced by tradesmen at all levels of commerce when price wars erupt in the sale of gasoline. It is realized that efforts often are made by some suppliers to cooperate with and assist their dealers in various ways so as to enable them to compete in the course of price wars. However, in doing so they should avoid transgressions of the antitrust laws. A seller may apply to the Commission for advice on appropriate, legal methods for meeting the problem in the particular circumstances it faces. The solution, we are sure, does not lie in the use of price fixing schemes violating the antitrust laws. Respondent here cannot justly claim that it was acting only in self-defense or the defense of its dealers since its course of conduct went beyond any such objective and reached into the area of unlawful price fixing. Such conduct we must condemn. Even if respondent had proceeded from entirely good motives, that circumstance would be no justification here for the infractions of law disclosed. *Fashion Originators Guild of America, Inc. et al.* v. *Federal Trade Commission,* 312 U.S. 457 (1941); *Paramount Famous Lasky Corporation, et al.* v. *United States,* 282 U.S. 30, 44 (1930).

The examiner found in the initial decision that on the forms for refunds on dealer assistance the distributors indicate "the dates and total gallonage sold at the reduced price and a list of the dealers to whom they gave the rebate." This appears to be incorrect and, while it is not a crucial finding, we believe it should be changed. The words "total" and "sold at the reduced price" will not be adopted as part of the Commission's findings.

The exceptions to the initial decision of respondent are rejected and the exceptions of counsel supporting the complaint are sustained to the extent indicated. An appropriate order will be entered.

Commissioner Elman does not concur.

Commissioners Anderson and Higginbotham did not participate in the decision of this matter, the former for the reason that he did not hear oral argument, and the latter by reason of the fact that this matter was argued before the Commission prior to the time he was sworn into office.

MAY 16, 1963.

United States of America

Before Federal Trade Commission

COMMISSIONERS:
Paul Rand Dixon, *Chairman*
Sigurd Anderson
Philip Elman
Everette MacIntyre
A. Leon Higginbotham, Jr.

Docket No. 7471

IN THE MATTER OF THE ATLANTIC REFINING COMPANY, INC., A CORPORATION

Order Partially Adopting Initial Decision and Providing for the Filing of Objections to Proposed Order and Reply

The Commission having rendered its decision in part allowing and in part disallowing complaint counsel's exceptions to the initial decision and disallowing all of respondent's exceptions thereto:

IT IS ORDERED that the Findings of Fact numbered I through IX of the Initial Decision be and hereby are adopted as the Findings of the Commission, excepting that the words "total" and "sold at the reduced price" in item numbered (2) of part VII thereof are incorrect and are not adopted. Those parts of the initial decision not expressly adopted are set aside and do not constitute part of the decision of the Commission.

IT IS FURTHER ORDERED that respondent may, within twenty (20) days after service upon it of this

order and the attached Opinion of the Commission, file with the Commission its exceptions to the Proposed Final Order herein set out, a statement of its reasons in support thereof, and a proposed form of order appropriate to the Commission's decision; and that counsel supporting the complaint may, within ten (10) days after service of respondent's exceptions, file a statement in reply thereto, supporting the Proposed Final Order.

IT IS FURTHER ORDERED that if no exceptions to the Commission's Proposed Final Order are filed within twenty (20) days, the said Order shall then become the Final Order of the Commission.

Proposed final order

IT IS ORDERED that the respondent, The Atlantic Refining Company, a corporation, its officers, directors, agents, representatives, or employees, directly or through any corporate or other device in, or in connection with, the offering for sale, sale, or distribution of gasoline, in commerce as "commerce" is [sic] defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

1. Entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, arrangement, agreement, contract or conspiracy with any person or persons not parties hereto, to establish, fix, adopt, maintain, adhere to, or stabilize by any means or method, prices, terms or conditions of sale at which its gasoline is to be sold.

2. Establishing, maintaining, continuing, cooperating in, or carrying out, or attempting so to do, any plan, policy, program, or any consignment policy in combination with any other person or persons not parties hereto, for the purpose or with the effect of enabling respondent to establish or fix the prices,

terms or conditions of sale at which its gasoline is to be resold by a dealer after purchase from respondent.

3. Coercing, persuading, inducing, or otherwise unduly influencing, directly or indirectly, its independent wholesale distributors to enter into, cooperate in, or carry out any planned common course of action, understanding, arrangement, agreement, combination, or conspiracy to establish, fix, stabilize, maintain, or adhere to, by any means the wholesale price at which gasoline is sold by said wholesale distributors or the retail prices at which gasoline is to be resold by retail service stations owned and operated by said distributors and retail dealer customers of said wholesale distributors.

Provided, However, that nothing herein contained shall be construed to limit or otherwise affect any resale price maintenance contracts which respondent may enter into in conformity with Section 5 of the Federal Trade Commission Act, as amended by the McGuire Act (Public Law 542, 82nd Cong. 2nd Sess., approved July 14, 1952).

By the Commission, Commissioner Elman not concurring, and Commissioners Anderson and Higginbotham not participating, the former for the reason that he did not hear oral argument, and the latter by reason of the fact that this matter was argued before the Commission prior to the time when he was sworn into office.

JOSEPH W. SHEA
Joseph W. Shea,
Secretary.

ISSUED: May 16, 1963

U.S. GOVERNMENT PRINTING OFFICE: 1963